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No. 84-1578

In The

Supreme Court of the United States

October Term, 1984

ISABEL MOREL DE LETELIER; MICHAEL MAGGIO AS PERSONAL REPRESENTATIVE OF ORLANDO LETELIER; CHRISTIAN A. LETELIER; JOSE J. LETELIER; FRANCISCO J. LETELIER; JUAN PABLO LETELIER; MICHAEL MOFFITT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF RONNI KARPEN MOFFITT; MURRAY H. KARPEN; and HILDA KARPEN,

Petitioners,

-against-

THE REPUBLIC OF CHILE and
LINEA AEREA NACIONAL-CHILE,

Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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While respondent offers only a token defense of the more extreme conclusions of the court of appeals, it asserts that the decision below was narrowly fact-based and that the questions petitioners present are unsuitable for review on certiorari. We seek to dispell any confusion respondent may have created.

1. Petitioners' First Question Is Plainly Presented

As to the "mutual exclusivity" of FSIA § 1605(a)(5) as a basis for adjudication and FSIA § 1610(a)(2) as a basis for execution, respondent argues that the court of appeals only "suggest[ed]" its conclusion in this regard (Brief in Opposition 8-9, "Br. Opp."), but respondent has quoted only a snippet from the

court of appeals' words, omitting the next sentence in which the court went on to conclude that since jurisdiction to adjudicate was exercised on one basis it was "inconsistent" to permit execution on another. Petition For A Writ Of Certiorari, Appendix 11a-12a ("Pet. App."). We respectfully refer this Court to the text of the court of appeals' opinion itself. *Id.* If the statute made it "inconsistent" to grant relief, that was a sufficient ground for upholding Chile's sovereign immunity from execution. To be sure, the court of appeals did not uphold the immunity on that ground alone. It went on to say that there was "more" (Pet. App. 12a), *i.e.*, a concurrent ground for upholding the immunity, namely that the acts of airline personnel at the behest of Chile which formed part of the basis for petitioners' claim were not in fact "commercial" since, in the court of appeals' view, they were necessarily motivated either by a political complicity (*id.*) or by a social relationship with the Chilean agents. *Id.* 10a. It is well settled, however, that:

> [W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, "the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other."

United States v. *Title Ins. Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R. Co.* v. *Mason City & Fort Dodge R. Co.*, 199 U.S. 160, 166 (1905)).

2. Contrary To Respondent's Contention, The Court Of Appeals' Decision Was Not A Narrow, Factual Matter

It should be recalled that Chile defaulted upon discovery in this proceeding and its airline operation refused to make any discovery.[1] Petitioners' case for the involvement of airline activities therefore had to be made on the basis of self-serving admissions which airline personnel made to a Congressional subcommittee and a grand jury—hence the claims of airline personnel that they thought they were merely being asked to transport jars of "peanut

1. The airline had not as yet been held in default when appointment of the receiver was ordered.

butter" and the like (JA 170), that they knew the mysterious official was part of the Chilean government but not that he was with DINA (JA 168, 172, 463, 465), that they co-operated with him as friends (JA 168-69), for reasons of patriotism (JA 168, 171), or because the chief pilot told them to. JA 175. While petitioners think it evident that the transportation-related activities of airline personnel were "commercial" and the district court so found (Pet. App. 39a-43a), the court of appeals adopted an illogical either-or hypothesis, that the acts were motivated either by political complicity or personal friendship, and concluded that such motive or purpose rendered them noncommercial—even though the statute specifically mandates that it is the "nature" of conduct, not the "purpose", which determines whether it is to be deemed commercial. FSIA § 1603(d); reprinted, Pet. App. 57a. In conferring a privilege based on political motivation the court of appeals seemed to treat commercial airline activities within our country as an Act of State. This was manifestly wrong, but if motive was important then the court of appeals should not have denied petitioners the right to take discovery against judgment debtor and its airline in order to determine (1) the full scope of conduct by airline personnel and (2) the motivation for that conduct.

3. Respondent's Argument About Possible Or Potential Mootness Is A Feeble Makeweight

Respondent contends that the precedential effect of the court of appeals' decision will be blunted if Congress eventually legislates away the requirement that judgments against foreign sovereigns may be executed only upon property used in commercial activity that was a basis for the claim. Br. Opp. 11-12. Senator Mathias has introduced a bill that would have that effect. S. 1071, 99th Cong., 1st Sess., 131 Cong. Rec. S5370-5372 (daily ed. May 3, 1985). However, the possibility of ultimate enactment should scarcely allow the judgment debtor to evade review here. Since learned opinion, reflected in the views of the American Bar Association, has criticized the existing limitation on execution, this

Court should have no hesitation in striking down the improper extension of that limitation which the court of appeals has imposed. Moreover, the instant case is not just a "car bombing", as respondent suggests. Br. Opp. 2. A foreign sovereign has used its commercial airline operation as part of a scheme to carry out on our territory the public assassination of one of our citizens and of a former ambassador to whom our nation had granted refuge. The incident has been treated with the utmost solemnity by our government; its remonstrances have been sullenly ignored. If error was committed below which would permit Chile to escape its lawful responsibility, that error should not go uncorrected by this Court.

4. Respondent Seeks To Trivialize The *Bancec* Issue

In the courts below respondent steadfastly denied that its titular management knew airline personnel were performing services for the Chilean government. JA 641. In this Court, however, respondent trumpets that it may have been a joint tortfeasor with the Chilean government and that such status shelters it from any claim that the Chilean government abused its separate jural personality in enlisting the co-operation of its employees. Br. Opp. 14, 18, 23-24. Such argument is absurd. While the proven activities of airline employees were clearly within the chain of causation, we simply do not know the degree of complicity they had or whether their action would have made the airline, qua entity, a co-conspirator. Even if the airline operation could have been held liable as a joint tortfeasor because of the "key role" its personnel played in the wrong, that would hardly refute our charge that its owner abused its corporate personality. Just three years ago the Second Circuit held that the jural personality of a foreign state's instrumentality would be disregarded *only* if the instrumentality had played a "key role" in the wrong alleged. *First Nat. City Bank* v. *Banco para el Comercio ("Bancec")* 658 F.2d 913, 918 (2d Cir. 1982). That holding was overruled by this Court. *Bancec*, 462 U.S. 611, 619 (1983). Now the Second Circuit seems to have gone to the other extreme, holding that if the

instrumentality has been caused to play a key role in the wrongful scheme and accordingly might have been a joint tortfeasor, then the separate personality should *not* be disregarded. Pet. App. 9a. Why indeed is it not an abuse of the corporate form for a company's owner to divert its commercial activities to his own illicit purposes? Why should the United States maintain Chile's privilege of separate incorporation in this context, where there has been so great a deviation from the normal corporate purposes for which Chile is allowed to operate an airline in our territory?

Respondent contends that the question of the availability of assets of a lesser state entity to satisfy a liability of the state is not sufficiently important to justify further consideration of the subject only two terms after *Bancec* (Br. Opp. 17, 19), but the court of appeals has shown itself completely unable to apply the analysis of *Bancec* outside the precise context of that case. If *Bancec* is to have any meaning, the Court should indeed consider its application not just in the context of set-off and counterclaim but also in that of execution of judgment.

5. Chile's Default On Discovery Justifies Sanctions

Respondent seems not to dispute the importance of the question whether a foreign state may effectively be sanctioned for refusal to make discovery and whether such sanction may have conclusive effect upon its wholly-owned subsidiary. However, respondent argues that the question should not be considered in this case because the discovery sought may have had intelligence implications (Br. Opp. 23) and the question is too novel for review here. *Id.* 20. First, discovery was addressed to Chile only after the district court had found that petitioners had made a "considerable", "threshold" showing of Chile's wrongful use of the airline. Pet. App. 32a, 31a. It is idle to speculate whether Chile might have objected to particular matters on intelligence or other grounds since its reaction was default—a clearly impermissible course. Second, the fact that the issue arises in the novel context of litigation with a sovereign adds to its importance, and FSIA § 1606 makes clear that foreign sovereigns must make

discovery in substantially the same manner as private litigants. *See* legislative history, cited Pet. 28. The court of appeals' error is therefore blatant. In concluding that a wholly-owned subsidiary is immune from the consequences of its owner's defiance of court process, the Second Circuit has contradicted not only *Trans World Airline, Inc.* v. *Hughes Tool Co.*, 449 F.2d 51, 59 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), and the progeny of that case (discussed Pet. 27), but also the essential conclusion of *In Re Uranium Antitrust Litigation*, 617 F.2d 1248, 1259-60 (7th Cir. 1980).

Respondent repeatedly asserts that the district court which granted relief to petitioners had held that the factual record was "inadequate" to establish Chile's improper use of its airline (Br. Opp. 3, 6), but respondent omits the district court's further statement that "[w]hile the showing against Chile is considerable, in a matter of this significance a more fully developed record is appropriate if not essential." Pet. App. 32a. Chile subsequently defaulted upon discovery and its airline also failed to make discovery, despite the district court's orders. Respondents therefore bear responsibility for any inadequacy of the record, and petitioners are fully entitled to ask that the facts be considered in the light most favorable to them. *See e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853, 863 (1982). In view of the admissions of airline personnel (Pet. 3, 3 n.2, *supra* at 2-3) and other admissible evidence presented, it is incredible that counsel for the airline should suggest at this stage that Chilean agents simply "use[d] the commercial services of the state's commercial entity in the same manner as they could have used a private entity's commercial services...." Br. Opp. 19. They could use the entity as wrongfully and as promiscuously as they did because airline personnel understood they were agents of its owner, the state. The District Court for the District of Columbia (Br. Opp. App. 8a), the House Subcommittee on Government Activities and Transportation (H.R. Rep. No. 1157, 96th Cong., 2d Sess. (1980)), and the District Court for the Southern District of New York (Pet. App. 25a-26a, 30a-31a, 31a-32a) have all attested to the evidence that Chile made

improper use of the commercial activity of its airline entity to serve purposes of the state which were sharply at odds with normal corporate purposes of the airline. Chile's default upon discovery as to that issue fully justifies entry of a factual sanction which binds its wholly-owned airline as well as itself.

CONCLUSION

In essence, the question raised here is whether a foreign state can divert a commercial activity which it conducts upon our territory to illicit and damage-causing purposes of that state and yet evade execution upon its ownership interest in the assets of that commercial activity. The question is urgent and has been decided wrongly and dogmatically by the court of appeals. For the reasons set forth above and in the petition the petitioners respectfully ask that this Court grant the writ of certiorari.

Respectfully submitted,

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